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No. 94-1041

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JACK R. HAWKINS and CYNTHIA HAWKINS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

GREGORY R. SMITH
(Counsel of Record)
LAWRENCE M. STONE
ELLIOT BROWN
IRELL & MANELLA
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
(310) 277-1010

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PETITIONERS' SUPPLEMENTAL BRIEF

In the Brief for the United States filed with respect to the Petition for a Writ of Certiorari of Jack R. Hawkins and Cynthia Hawkins, the United States concludes:

> The petition for a writ of certiorari should be held pending this Court's disposition of *Commissioner v. Schleier*. In the event the issue presented in this case is not resolved in *Schleier*, the petition should be granted.

Resp. Br. at 4.

The United States thus concurs that the issue raised by the Hawkinses' petition is worthy of certiorari and requires resolution by this Court. The United States also concurs that this issue may be implicated by this Court's decision in *Commissioner v. Schleier*, No. 94-500, which is scheduled for oral argument on March 27, 1995.

Petitioners agree with the Government that, at a minimum, the petition herein should be held pending this Court's disposition of *Schleier*, and that if the issue presented in this case is not resolved in *Schleier*, the petition should be granted. But petitioners do not agree that holding this petition is preferable to granting it now.

In *Schleier*, this Court is presented with the issue of whether compensatory and liquidated damages awarded under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* ("ADEA"), are excluded from gross income under section 104(a)(2) of the Internal Revenue Code as "damages received . . . on account of personal injuries." 26 U.S.C. § 104(a)(2). The United States contends that ADEA damages are not for "personal injuries" because they do not compensate for the traditional harms associated with personal injuries. As a fall-back, the Government argues that even if ADEA damages are for personal injuries, the liquidated damages portion of such damages is the same as punitive damages, and that the latter ought not to be considered "on account of" the underlying personal injury. The taxpayers in *Schleier* may prevail with respect to ADEA liquidated damages either by establishing that such damages are excluded from gross income because they are different from punitive damages or, alternatively, that to the extent that punitive damages and liquidated damages are similar, both are excluded.

It is thus accurate, as the Government notes at page 4 of its Brief, that the issue of whether punitive damages are "on account of personal injuries" has been briefed in *Schleier*. But this is primarily true for the Government, and not for the taxpayers. The taxpayers have primarily tried to draw a distinction between liquidated and punitive damages, arguing that the former are compensatory and that the latter are not, and that this distinction is relevant to whether the damages are excluded. When the taxpayers finally address the issue of whether punitive damages

ought also to be excluded, they do so with reluctance and in only the final three pages (at 39-42) of their brief.[1]

While the Government would prefer a decision in *Schleier* which holds that neither liquidated nor punitive damages are excluded from gross income, a decision which draws a distinction between those types of damages would also serve its interests: Inclusion of punitive damages in gross income is, to the Government, preferable to the exclusion of both punitive and ADEA liquidated damages. Moreover, the taxpayers in *Schleier* would not be adversely affected by a decision which draws a distinction between punitive damages and ADEA liquidated damages, permitting the exclusion from gross income of the latter but not the former.

In fairness to the taxpayers, such as the Hawkinses, who would be adversely affected by such a holding (or dicta) in *Schleier*, petitioners respectfully request that the issue of whether punitive damages are excluded from gross income not be decided absent briefing and argument by a party in whose interest it is to establish that punitive damages are "on account of personal injuries." [2]

There would be considerable benefit to deciding *Schleier* and *Hawkins* simultaneously. The only reason favoring the government's "wait and see" position is the fact that *Schleier* has now been fully briefed and set for oral argument.[3] But this need not deter this Court from granting

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[1] In introducing their abbreviated argument, the taxpayers state: "By attempting to style ADEA liquidated damages as exclusively punitive, petitioner is inviting the Court to resolve a question beyond the scope of Mr. Schleier's case, concerning which courts are in disagreement." Brief for Respondents Erich E. and Helen B. Schleier at 39.

[2] Unlike *Schleier*, the United States concedes in *Hawkins* that the underlying claim is for personal injuries.

[3] But for the Government's obtaining a thirty-day extension for the filing of its brief herein, the argument in *Schleier* would not

the petition in this case now. Oral argument in *Schleier* can be reset to permit briefing in this case and simultaneous oral argument. Alternatively, the decision in *Schleier* can be withheld pending briefing and oral argument in this case. Either of those options will help ensure that the issue raised in this case will not be decided by default, but will be squarely and fully addressed after briefing and argument by a party interested in advocating all of the reasons that punitive damages should be excluded under Section 104(a)(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY R. SMITH
(Counsel of Record)
LAWRENCE M. STONE
ELLIOT BROWN
IRELL & MANELLA
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
(310) 277-1010

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be so close in time to this Court's consideration of the Hawkinses' petition.